

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALAN CLICK,

Defendant-Appellant.

UNPUBLISHED
February 14, 2003

No. 235726
Saginaw Circuit Court
LC No. 00-018639-FC

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), one count of CSC II, MCL 750.520c(1)(a), and one count of disseminating sexually explicit matter to a minor, MCL 722.675.¹ He was sentenced to 15 to 25 years' imprisonment on each conviction for CSC I, 8 to 15 years' imprisonment for CSC II, and 23 to 24 months' imprisonment for distributing sexually explicit matter to a minor. This case arose when defendant downloaded obscene images of children onto his computer, displayed the material to his ten-year-old stepdaughter, and engaged in three separate sexual episodes with her. Defendant now appeals as of right. We affirm but remand for correction of his judgment of sentence with regard to the sentence for distributing sexually explicit matter to a minor.

Defendant first argues that the trial court deprived him of his Sixth Amendment right to confrontation when it limited defendant's cross-examination of his ex-wife. We disagree. We review a trial court's limitation of cross-examination for an abuse of discretion. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The trial court has broad discretion "to impose reasonable limits . . . based on concerns about . . . prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), quoting *Delaware v Van Arsdall*, 475 US 673, 678; 89 L Ed 2d 674; 106 S Ct 1431 (1986). In this case, the trial court properly

¹ During the jury trial, defendant pleaded guilty to a separate count of possession of child sexually abusive material, MCL 750.145c(4), but does not challenge this conviction in the present appeal.

exercised its discretion by limiting cross-examination of defendant's ex-wife because the issues that defense counsel attempted to present were collateral to any issues in the case.

Next, defendant argues that the trial court committed error requiring reversal when it admitted other-acts evidence under MRE 404(b) regarding defendant's entry into an Internet chat room containing written child pornography. We disagree. We review a trial court's decision to admit other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Other-acts evidence is admissible to prove "absence of mistake or accident when the same is material . . ." MRE 404(b)(1). *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 743-75; 508 NW2d 114 (1998). Here, the trial court properly admitted the other-acts evidence in question, which the prosecution introduced to rebut defendant's claim that he viewed child pornography on the computer by accident.

Defendant also claims that he was denied a fair trial on the basis of prosecutorial misconduct. Because defendant did not object below, he failed to preserve the issue for appellate review. We thus review the allegations of prosecutorial misconduct for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, defendant cannot show plain error because the prosecutor's remarks in closing argument did not deprive him of a fair trial. First, while defendant claims that the prosecutor denigrated him by questioning his veracity in closing argument, we note that it is not error for a prosecutor to question, as here, a witness' credibility. *People v Lanusburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Second, defendant has failed to show that the prosecutor committed error by vouching for the credibility of the victim in closing argument. See *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Taken in context, the prosecutor's remarks in closing argument did not suggest that he personally believed that the victim was testifying truthfully or that the government possessed information verifying her testimony. Rather, the remarks in question focused on the frankness and reasonableness of her testimony. There is also no merit to defendant's contention that the prosecutor unfairly used sympathy to obtain the guilty verdicts against defendant.

Finally, defendant argues that the trial court erred when it sentenced him to a minimum term of 23 months' imprisonment and maximum term of 24 months' imprisonment on his conviction for distributing sexually explicit matter to a minor, MCL 722.675. We agree. In *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), the Supreme Court stated that "any sentence which provides for a minimum exceeding two-thirds of the maximum is improper . . ." *Id.* at 690. Here, the trial court erred when it sentenced defendant to 23 to 24 months' imprisonment on his conviction for distributing sexually explicit matter to a minor. However, defendant is not entitled to resentencing because the imposition of a partially invalid sentence does not mandate setting aside the entire sentence. Rather, the sentence "is to be set aside only 'in respect to the unlawful excess.'" *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994) (citing MCL 769.24.) Because defendant's minimum sentence on this conviction exceeds the allowable statutory minimum by exactly seven months, we vacate that part of the trial court's sentencing decision and remand for correction of the sentence to a sixteen month minimum term of imprisonment and a twenty-four month maximum term of imprisonment.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Pat M. Donofrio